

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LINDA SUE BOWEN,
Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner
of Social Security,¹
Defendant.

No. CV-11-0414-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. (ECF Nos. 11, 13). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Kathy Reif represents the Commissioner of Social Security (defendant). On March 18, 2013, plaintiff filed a reply. (ECF No. 15). After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's Motion for Summary Judgment

JURISDICTION

Plaintiff applied for a period of disability and disability insurance benefits (DIB) on August 27, 2009, alleging disability as of September 1, 2005 (Tr. 17). The applications were denied initially and on reconsideration.

¹As of February 14, 2013, Carolyn W. Colvin succeeded Michael J. Astrue as Acting Commissioner of Social Security. Pursuant to Fed.R.Civ.P. 25(d), Commissioner Carolyn W. Colvin is substituted as the defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405(g).

1 Administrative Law Judge (ALJ) James W. Sherry held a hearing
2 on September 15, 2010 (Tr. 30-60), and issued an unfavorable
3 decision on October 28, 2010 (Tr. 17-24). The Appeals Council
4 denied review on September 6, 2011 (Tr. 1-6). The ALJ's October
5 2010 decision became the final decision of the Commissioner, which
6 is appealable to the district court pursuant to 42 U.S.C. §
7 405(g). Plaintiff filed this action for judicial review on
8 October 31, 2011. (ECF No. 1).

9 **STATEMENT OF FACTS**

10 The facts have been presented in the administrative hearing
11 transcript, the ALJ's decision, and the briefs of the parties.
12 They are only briefly summarized here.

13 Plaintiff was born on January 31, 1949, and was 56 years old
14 on the alleged onset date (Tr. 33). She obtained her high school
15 diploma and attended some college (Tr. 34). Plaintiff worked for
16 real estate companies doing secretarial work from 1995 to 1998,
17 worked briefly as a medical transcriptionist in 2000, and worked
18 for Dictation Service Center doing medical dictation from 2000 to
19 2002 (Tr. 36-38). At the hearing, plaintiff testified she stopped
20 working in 2002 because she was no longer capable of doing her job
21 accurately (Tr. 38). She stated she had difficulty with typing,
22 putting things in proper order and spelling, and, as a result, was
23 terminated from her job (Tr. 38). Upon questioning by the ALJ,
24 plaintiff stated that after she stopped working in 2002, she cared
25 for her husband who was "very ill" at the time (Tr. 45).

26 Plaintiff indicated that, in 2005, her memory was not good,
27 she was not able to handle a checkbook or pay her bills, she had
28 difficulty making change, and her husband took over the cooking

1 responsibilities (Tr. 39-40). She stated she has a driver's
2 license but no longer drives (Tr. 40). She testified she relies
3 on her husband for transportation (Tr. 42-43). Plaintiff
4 indicated she sleeps quite well with medication, but her sleep
5 would be "fitful" without her medication (Tr. 43).

6 Plaintiff's husband, Don Bowen, also testified at the
7 administration hearing on September 15, 2010 (Tr. 45-55). Mr.
8 Bowen indicated he was having breathing problems in 2002 that
9 resulted in his retirement from his employment in sheet metal
10 construction, but that the issue did not require his wife to care
11 for him (Tr. 47). Mr. Bowen testified that, in 2002, plaintiff's
12 typing skills diminished and she could no longer do the checkbook
13 (Tr. 47-48). He stated that plaintiff could still make change in
14 2002, but by 2004 she was no longer capable of going to a store
15 and paying for groceries on her own (Tr. 48). Mr. Bowen indicated
16 plaintiff stopped driving and cooking in 2005, had difficulty
17 remembering appointments in 2005, and could no longer sew by 2006
18 (Tr. 49-50).

19 Mr. Bowen testified that, in 2005, plaintiff was able to
20 clean the house and assist with work on their land (Tr. 51). He
21 stated, however, that plaintiff was no longer able to perform the
22 house cleaning by 2007, because she was not able to stay on task
23 (Tr. 52). Mr. Bowen stated that her difficulty with housework in
24 2007 resulted in the first visit with Dr. Clark (Tr. 52). Mr.
25 Bowen opined that plaintiff would not have been able to work in
26 2005 because she was not capable of keeping on track (Tr. 54). He
27 further indicated that her condition has gradually gotten worse
28 over time (Tr. 54-55).

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which

1 compares plaintiff's impairment with a number of listed
2 impairments acknowledged by the Commissioner to be so severe as to
3 preclude substantial gainful activity. 20 C.F.R. §§
4 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
5 App. 1. If the impairment meets or equals one of the listed
6 impairments, plaintiff is conclusively presumed to be disabled.
7 If the impairment is not one conclusively presumed to be
8 disabling, the evaluation proceeds to the fourth step, which
9 determines whether the impairment prevents plaintiff from
10 performing work which was performed in the past. If a plaintiff
11 is able to perform previous work, that plaintiff is deemed not
12 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
13 this step, plaintiff's residual functional capacity (RFC) is
14 considered. If plaintiff cannot perform past relevant work, the
15 fifth and final step in the process determines whether plaintiff
16 is able to perform other work in the national economy in view of
17 plaintiff's residual functional capacity, age, education and past
18 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
19 *Bowen v. Yuckert*, 482 U.S. 137 (1987).

20 The initial burden of proof rests upon plaintiff to establish
21 a *prima facie* case of entitlement to disability benefits.
22 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
23 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
24 met once plaintiff establishes that a physical or mental
25 impairment prevents the performance of previous work. The burden
26 then shifts, at step five, to the Commissioner to show that (1)
27 plaintiff can perform other substantial gainful activity and (2) a
28 "significant number of jobs exist in the national economy" which

1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
2 Cir. 1984).

3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a
5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
6 the Commissioner's decision, made through an ALJ, when the
7 determination is not based on legal error and is supported by
8 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
9 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
10 1999). "The [Commissioner's] determination that a plaintiff is
11 not disabled will be upheld if the findings of fact are supported
12 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
13 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
14 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
15 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989).
17 Substantial evidence "means such evidence as a reasonable mind
18 might accept as adequate to support a conclusion." *Richardson v.*
19 *Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch
20 inferences and conclusions as the [Commissioner] may reasonably
21 draw from the evidence" will also be upheld. *Mark v. Celebrezze*,
22 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers
23 the record as a whole, not just the evidence supporting the
24 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,
25 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526
26 (9th Cir. 1980)).

27 It is the role of the trier of fact, not this Court, to
28 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If

1 evidence supports more than one rational interpretation, the Court
2 may not substitute its judgment for that of the Commissioner.
3 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
4 (9th Cir. 1984). Nevertheless, a decision supported by
5 substantial evidence will still be set aside if the proper legal
6 standards were not applied in weighing the evidence and making the
7 decision. *Browner v. Secretary of Health and Human Services*, 839
8 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
9 evidence to support the administrative findings, or if there is
10 conflicting evidence that will support a finding of either
11 disability or nondisability, the finding of the Commissioner is
12 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
13 1987).

14 **ALJ'S FINDINGS**

15 The ALJ found plaintiff was insured through March 31, 2007.
16 Therefore, plaintiff must establish disability prior to March 31,
17 2007 (Tr. 17, 33). At step one, the ALJ found that plaintiff did
18 not engage in substantial gainful activity during the period from
19 her alleged onset date of September 1, 2005, through her date last
20 insured (Tr. 19). The ALJ determined plaintiff had the following
21 medically determinable impairments during the relevant time
22 period: major depressive disorder with anxious features, and
23 history of panic attacks (Tr. 19). However, at step two, he found
24 plaintiff did not have an impairment or combination of impairments
25 that significantly limited her ability to perform basic work-
26 related activities for 12 consecutive months. (Tr. 19).
27 Accordingly, the ALJ determined that plaintiff did not have a
28 severe impairment during the relevant time period in this case

1 (Tr. 19). Consequently, the ALJ concluded that plaintiff was not
2 disabled as defined by the Social Security Act from September 1,
3 2005, the alleged onset date, through March 31, 2007, plaintiff's
4 date last insured (Tr. 24).

5 **ISSUE**

6 Plaintiff argues that the ALJ's step two determination that
7 she had no severe impairments was erroneous (ECF No. 12 at 7-11).

8 **DISCUSSION**

9 Plaintiff alleges the ALJ should have found, at step two,
10 that she suffered from severe mental impairments during the
11 relevant time period, from September 1, 2005, to March 31, 2007
12 (ECF No. 12 at 7-11).

13 Plaintiff has the burden of proving she has a severe
14 impairment at step two of the sequential evaluation process. 42
15 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. In
16 order to meet this burden, plaintiff must furnish medical and
17 other evidence that shows she has a severe impairment. 20 C.F.R.
18 § 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c),
19 416.920(c), provide that an impairment is severe if it
20 significantly limits one's ability to perform basic work
21 activities. An impairment is considered non-severe if it "does
22 not significantly limit your physical or mental ability to do
23 basic work activities." 20 C.F.R. §§ 404.1521, 416.921. In the
24 absence of objective evidence to verify the existence of an
25 impairment, the ALJ must reject the alleged impairment at step two
26 of the sequential evaluation process. SSR 96-4p.

27 Step two is "a de minimis screening device [used] to dispose
28 of groundless claims," *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th

1 Cir. 1996), and an ALJ may find that a claimant lacks a medically
2 severe impairment or combination of impairments only when this
3 conclusion is "clearly established by medical evidence." S.S.R.
4 85-28; see, *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir.
5 2005). Applying the normal standard of review to the requirements
6 of step two, the Court must determine whether the ALJ had
7 substantial evidence to find that the medical evidence clearly
8 established that plaintiff did not have a medically severe
9 impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)
10 ("Despite the deference usually accorded to the Secretary's
11 application of regulations, numerous appellate courts have imposed
12 a narrow construction upon the severity regulation applied
13 here."); *Webb*, 433 F.3d at 687.

14 Here, the ALJ concluded that, during the relatively narrow
15 relevant time period, the medical record contains insufficient
16 evidence to support a finding of a severe impairment (Tr. 21).
17 The undersigned agrees.

18 There is simply no objective evidence to substantiate
19 plaintiff's claim of dementia during the relevant time period. As
20 noted by the ALJ, treatment notes from 2005-2006 reflect few
21 complaints of, or treatment for, mental symptoms (Tr. 21).
22 Rather, plaintiff was primarily treated for reported physical
23 symptoms during that period of time (Tr. 21, 223-278).

24 On January 5, 2005, plaintiff was evaluated by Lior Givon,
25 M.D., Ph.D., for treatment of depressive symptoms (Tr. 275-278).
26 Plaintiff reported at that time that when she began taking "a male
27 hormone" in 1989, she became forgetful of details at work and
28 started "gradually going downhill" (Tr. 275). She related,

1 however, that Zoloft, an antidepressant medication, helped regain
2 some of her functioning (Tr. 275). The mental status exam
3 revealed the following: plaintiff was very friendly and pleasant;
4 she demonstrated good hygiene; she maintained good eye contact;
5 her thought processes were linear and goal directed with no
6 evidence of disorganization; there was no evidence of
7 hallucinations or delusions; her judgement and insight were fair;
8 and her intelligence was estimated as average (Tr. 277). Dr.
9 Givon diagnosed plaintiff with major depressive disorder, moderate
10 to severe, in partial remission, with anxious features, and
11 history of panic attacks, and gave her a global assessment of
12 functioning (GAF) score of 70-75² (Tr. 277).

13 A February 24, 2005, clinic note from Deborah A. Montowski,
14 M.D., indicates plaintiff was seen following an adverse reaction
15 to Wellbutrin, a different antidepressant medication (Tr. 268).
16 It was noted that plaintiff's mother had passed away "in the
17 middle of all this" and that she had "some severe depression and
18 anxiety with a serotonin syndrome," but was doing "fairly well" at
19 that time (Tr. 268).

20 There are no other medical reports of record which document
21 mental health related issues from a time prior to plaintiff's date
22 last insured.

23 Given the foregoing limited medical evidence, which fails to
24 establish the existence of dementia prior to March 31, 2007, or

25
26 ²A GAF of 80-71 indicates: "If symptoms are present, they
27 are transient and expectable reactions to psychosocial stressors
28 . . .; no more than slight impairment in social, occupational, or
school functioning." See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL
DISORDERS 32 (4th ed. 1994).

1 that plaintiff's depression and panic attack significantly limited
2 her ability to do basic work activities prior to March 31, 2007,
3 the undersigned finds that the ALJ did not err by finding that
4 plaintiff suffered from no severe impairments during the relevant
5 time period in this case.

6 While plaintiff argues that a May 18, 2007 clinic note from
7 April S. Hume, M.D., (Tr. 202), July 31, 2007 and February 14,
8 2008 evaluations completed by J. Robert Clark, M.D., (Tr. 190-
9 196), an evaluation completed by Jennifer Van Wey, Psy.D., in July
10 2009 (Tr. 210-222), and December 2009 and June 2010 records from
11 Sylvia Rojas, M.D. (Tr. 299-304) demonstrate she suffered from
12 severe mental impairments, those records post-date plaintiff's
13 date last insured. Because these reports do not evidence
14 plaintiff's functional limitations between the alleged onset date
15 and the date last insured, they are immaterial in this case.

16 In any event, as discussed by defendant, the evidence from
17 after the expiration of plaintiff's insured status does not
18 undermine the ALJ's determination.

19 While Dr. Hume noted plaintiff's complaints of memory loss
20 "for the past three to four months", Dr. Hume failed to conduct
21 objective testing, such as a mini mental status exam, to confirm
22 memory loss and did not diagnose dementia (Tr. 202). Dr. Hume's
23 report merely documents plaintiff's reported recent memory
24 difficulties.

25 With respect to Dr. Clark's July 31, 2007 neurological
26 evaluation, plaintiff earned 27/30 on a mini mental status exam
27 (Tr. 191-192). Dr. Clark opined that plaintiff "probably does not
28 have dementia", but may be at risk for developing dementia (Tr.

1 193). He recommended an MRI scan of the brain. On a follow up
2 exam in February 2008, Dr. Clark noted plaintiff had an extensive
3 evaluation, with thyroid function studies, B12 studies and MRI
4 imagining in the brain. The results of all tests were within
5 normal limits (Tr. 195). He indicated plaintiff had been
6 restarted on Zoloft and was now functioning much better (Tr. 195).

7 Plaintiff's performance during Dr. Van Wey's July 2009
8 evaluation revealed some errors, such as stating there were 30
9 seconds in a minute, not naming the current president and
10 performance at the kindergarten range in arithmetic, were likely
11 committed due to poor effort and inattention (Tr. 217-218). Dr.
12 Van Wey indicated that while variable effort and attempts to
13 appear more impaired were evidenced during the evaluation,
14 plaintiff still demonstrated legitimate cognitive impairment (Tr.
15 218). Dr. Van Wey diagnosed plaintiff with dysthymic disorder and
16 probable dementia of the Alzheimer's type, and gave her a GAF
17 score of 70³ (Tr. 218). Dr. Van Wey's report noted plaintiff's
18 daily activities as providing for personal care without
19 difficulty, working in her garden and talking to neighbors
20 throughout the day, caring for dogs she and her husband fostered
21 for a local pet rescue, using a computer for email and internet,
22 watching television and sewing (Tr. 214).

23 By December 2009, more than two years following the
24 expiration of plaintiff's insured status, Dr. Rojas definitively
25

26 ³A GAF of 70-61 is characterized as: "Some mild symptoms or
27 some difficulty in social, occupational, or school functioning,
28 but generally functioning pretty well." DIAGNOSTIC AND STATISTICAL
MANUAL OF MENTAL DISORDERS 12 (3d ed. Rev. 1987).

1 diagnosed early onset dementia, probable Alzheimer's type, likely
2 related to her history of brain trauma as a baby (Tr. 300).
3 However, as indicated above, the record reflects no opinion from a
4 treating or examining source indicating that plaintiff had more
5 than minimal functional limitations between the alleged onset date
6 and the date last insured.

7 The undersigned finds that the ALJ reasonably concluded
8 plaintiff's dementia was not medically determinable during the
9 relevant time period and plaintiff's depression and history of
10 panic attacks were non-severe impairments during the relevant time
11 period. Accordingly, the ALJ did not err at step two of the
12 sequential evaluation process in this case.

13 CONCLUSION

14 Having reviewed the record and the ALJ's conclusions, this
15 court finds that the ALJ's decision is free of legal error and
16 supported by substantial evidence. Accordingly,

17 IT IS HEREBY ORDERED:

18 1. Defendant's Motion for Summary Judgment (**ECF No. 13**) is
19 **GRANTED.**

20 2. Plaintiff's Motion for Summary Judgment (**ECF No. 11**) is
21 **DENIED.**

22 **IT IS SO ORDERED.** The District Court Executive is directed
23 to file this Order, provide copies to the parties, enter judgment
24 in favor of defendant, and **CLOSE** this file.

25 **DATED** this 29th day of May, 2013.

26 _____
27 S/Fred Van Sickle
28 Fred Van Sickle
Senior United States District Judge